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IN THE

Supreme Court of the United States

October Term, 1959

No.

SAUL GELB, also known as SOL GORDIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF

Point I

This case is a conflict between Government and petitioner whose basic rights are guaranteed by the United States Constitution. The actions of the Government in this case are arbitrary, unfair and with a malicious calculation.

The respondents through their brief and by their arguments and reasoning practically concede facts and the contentions of the petitioner for the relief he requests. Yet they avoid the real issues.

(a) Is the petitioner illegally detained?

(b) Can he serve a probation in jail in violation of 18 U. S. C. 3651 and 3653?

There are three separate indictments and three staggered sentences which arise out of and from the Southern

District of New York, and each of the sentences were imposed by judges of equal rank and authority. They also concede that petitioner was serving his parole and probation when he was sentenced by Mr. Justice Kaufman on April 28, 1958 (pp. 7, 11, 24-26), and, in addition, they concede that there was no violation of either; page 8, lines 16-23. They admit that there was no hearing to revoke parole or probation pursuant to 18 U. S. C. 3653.

It must also be noted that the Federal District Court, Southern District of New York, had jurisdiction of the petitioner from 1954 until the present date. During this period there was no formal release or surrender by

(a) the Parole Board,

(b) Probation Department or

(c) the consent of the Attorney General to relinquish, vacate, modify or withdraw the sentence of the Honorable Justice Ryan.

The sentence of Mr. Justice Kaufman on April 28, 1958 being a third sentence for a crime committed prior to parole and probation and by its terms of immediate confinement and by its failure to take into account the petitioner's parole and the sentence of Mr. Justice Ryan who sat with equal rights and authority in the same court, that the sentence of Judge Kaufman was in effect

(a) a revocation of probation without a hearing;

(b) tolled the sentence of Mr. Justice Ryan, and

(c) by its uncertain language and the omission of the words "concurrent or consecutive" must by the decisions of this court be only a concurrent sentence with that of Mr. Justice Ryan.

If the sentence of Mr. Justice Kaufman is concurrent, it cannot be one of confinement because the prior sentence is one of probation. If it is consecutive, then he is illegally

detained because the sentence of Mr. Justice Ryan of May 1956 must take priority because it is prior in time and prior in right.

It is also worthy to note that a sentence without definite language of the word "consecutive" must be deemed "concurrent."

The cases cited by the respondent, *U. S.* v. *Fenno*, 167 Fed. 2d 593, *U. S.* v. *Murphy*, 217 Fed. 2d 242, have no application to the within facts. A reading of these cases will reveal that there was a question of comity between the Federal Government and the State. The court held that the dignity of the state must not be breached and in each case the Federal Government voluntarily surrendered the defendant who could not question the rights of a sovereignty to prosecute for the crime. As a matter of fact, the court in both of these cases said:

> "It may be that where the second court obtains custody of a probationer in the absence of the express consent of the first court, it does so wrongly. This we need not decide."

Surely there is a serious question which has to be determined by this court.

Moreover, in the instant case, the petitioner committed crimes only against the Federal Government and was always within the jurisdiction of the Federal Court of the Southern District of New York. The position of petitioner is sustained in the case of *Grant* v. *Guernsey*, 63 Fed. 2d, p. 163, cert. den. by this court in 289 U. S. 744, where the court said:

> "There can be no doubt Guernsey was under the jurisdiction of the Federal Court subject to its orders under the probation statute at any time."

and the case states and cites: *Taylor* v. *Taintor*, 16 Wall. 366:

> "The tribunal which first gets its hold to the exclusion of the other until its duty is fully performed and

> the jurisdiction invoked is (exhausted) and this rule applies alike in both civil and criminal cases. It is indeed a principle of universal jurisprudence that where jurisdiction has attached to a person or thing it is * * * unless there is some provision to the contrary—exclusive in effect until it has wrought its function."

Here a Federal Court judge of the Southern District of New York issued a mandate and a sentence and within two years the same is overruled, abolished and extinguished by a judge of equal rank and power without a hearing and in violation of due process.

The sentence of Judge Ryan of May 18, 1956 was five years, suspended; on probation, to commence upon his release from incarceration he was then serving, subject to any other outstanding probation of this court. This sentence was operative but never allowed to be carried out by the actions of the Government.

In April 1956 when the Government returned Indictment 150-30 against the petitioner, they did not need any more information or investigation to prosecute the petitioner under Indictment 154-86. For they knew of all his activities because he was in their custody from May 5, 1954. Whether they needed more time to embrace the other defendants in the same indictment, was a matter of choice. In any event all the acts of the conspirators, including petitioner, had been completed *by May 1955*. If they had returned Indictment 154-86 on or before May 1956 and prior to the sentence of Mr. Justice Ryan, there would be no problem. It is obvious the petitioner, having pleaded guilty to the Indictment 144-59 in 1954 and the overt acts set forth in Indictment 154-86 were the same as in the previous indictment, the defendant had no way out but to plead guilty. However, the Government wanted to confine this petitioner to an institution for his natural life at any cost or calculation. Their plans and calculations went astray when they presented Indictment 150-30 and by reason of the sentence of

Mr. Justice Ryan on probation and suspension, they became disappointed and started a course of harassment.

The case cited by the respondent, *United States* v. *Murphy*, 247 Fed. 2d 247, states (p. 251):

> "The Report of the Special Committee of the Judicial Conference of the United States on Probation:
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> 'Your Committee finds it difficult to reconcile with the theory behind probation a sentence under which the offender serves a term in prison and after his release commences a period of probation. It would seem that if the present prison sentence is justifiable, then probation is not and if probation is desirable, then the jail sentence is a mistake.'"

Thus we have a situation so aptly described in the foregoing case. If the petitioner is serving his probation in jail or it may be that he is to serve it after the jail sentence, then actually the actions of the Government were in direct contravention of 18 U. S. C. 3653 and the very basic principles of probation law.

The defendant does not say or claim immunity by reason of the sentence of Mr. Justice Ryan. He admits that he must be sentenced by his plea of guilty to Indictment 154-56, but any sentence to be imposed by this court must be subject to the sentence of parole and probation which he was then serving. A third sentence may not interrupt the sentence the petitioner is serving without cause or hearing. The petitioner was always within the jurisdiction of the Federal Court and under their supervision.

How can the Government contend that it was unnecessary for Judge Kaufman to consider the sentence of Judge Ryan? They both are judges of equal rank, sitting in the same court and there is no admission or concession that the sentence of Judge Ryan was either eliminated, extinguished or terminated. The petitioner contends that he must serve each sentence as it is imposed, but he may not have it interrupted, tolled or suspended without a violation.

Point II

The *Grunewald* case cited by the respondent, which is good law, is not applicable to the facts herein. In the instant application, the conspiracy as charged to the petitioner was concededly terminated on March 4, 1954. This is by the Government's own contention and by the facts supporting his position here. The Government then had custody of the petitioner from May 1954 until November 1957. The statute of limitations changed on September 1, 1954, which extended the limitations to five years. The Goverment cites *Faiter* v. *U. S.*, 23 Fed. 2d 420. The court therein stated:

> "For the state to assure a man that he has become safe from its pursuit and thereafter to withdraw its assurances seems to most of us unfair and dishonest."
>
> • • •
>
> "But while the chase is on, it does not shock us to have it extended beyond the time first set."

In the facts here, the last quote is more applicable to the petitioner. He had committed all the crimes he was ever going to commit because of his confinement to a federal penitentiary. The knowledge of the petitioner's criminal activities, his custody within the confines of a federal penitentiary, and knowledge by the Federal Government presents a situation that Congress did not contemplate when it amended Section 18, U. S. C. 3282. For this petitioner is protected by the Constitution of the United States. On this point; Congress may not pass an *ex post facto* law. The act of Congress itself is not *ex post facto* in general.

As to this petitioner under the unusual facts, it is an *ex post facto* law because the Government had knowledge of the completion of a criminal act and custody by the authorities is sufficient to give this petitioner the benefit of the shorter period of the statute of limitations.

As far as this petitioner was concerned, the chase was over, he had completed his criminal act; he was in custody, and the Government had full knowledge of the crime of conspiracy to violate the law. Therefore, laxity on the part of the Government in allowing more than three years to elapse, since the commission of the crime, was an injustice and a failure to give the petitioner a speedy trial in violation of his constitutional rights.

The sentence which was imposed by the District Court between his confinement and his release as not an act of his own choice. The Government presented an indictment and the petitioner received his sentence which should be carried out to its conclusion.

Point III

Title 28, Sec. 2255 is in the form of a *coram nobis* proceeding. It is an application afforded to a prisoner that goes beyond the indictment and legal technicalities. The failure of the attorney to plead the defense of statute of limitations should not be a bar to the present application. The ineptness in the failure of counsel to plead such a defense should not impose a penalty upon the petitioner. It becomes unjust and inequitable to allow the Government to keep the defendant incarcerated for more than three years before it decides to return an indictment which on its face falls within the statute of limitations. There was definitely a calculation on the part of the Government to confine the defendant for the rest of his natural life by arbitrary and capricious methods. If individuals were not protected by a Constitution and by this court, prosecutors would run rampant and undermine our basic principles of justice enjoyed in our democracy.

The petition for certiorari should be granted.

Respectfully submitted,

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